its jurisdiction in the matter, was decided in *Ex parte Bradley*, 7 Wallace 364. It would serve no useful purpose to repeat the reasons by which this conclusion was reached, as they are fully and clearly stated in that case, and are entirely satisfactory.

A peremptory *mandamus* must issue, requiring the judge of the court below to vacate the order disbarring the petitioner, and to restore him to his office; and it is so ordered.

MILLER, J., dissented.

Court of Errors and Appeals of New Jersey.

MAYOR AND COMMON COUNCIL OF NEWARK *v.* THE STATE, AGENS ET AL., PROSECUTORS.

A statute authorizing the expense of paving the road-bed of a city street to be assessed in the proportion of two-thirds on the property abutting on the street and the remaining third on the public at large, is unconstitutional.

Assessments for local improvements of this character may be made against the property peculiarly benefited, but such assessment must be made to the extent only of such peculiar benefits.

This rule does not apply to improvements of the sidewalk, which is to be regarded as subservient to the premises to which it is attached and the expense of improving which may be charged wholly to the owner.

A statute directing a municipal corporation to have a street paved at the expense of the property-owners, and thereafter to keep it in repair at the expense of the city, is not a contract with the property-owners, and the legislature may direct a repaving at their expense.

THE 7th section of the Charter of Newark (Pamphlet Laws 1849, pp. 206, 207) provides "that it shall be lawful for the Common Council, on the application of three-fourths of the owners of property in any street, to order the said street or section of the street to be graded, gravelled, paved, flagged or planked, either in whole or in part, in such manner as they shall deem most advisable," &c., "and that after the said grading, gravelling, paving, &c., is once effected, then the city shall take charge of and keep the same in repair without further assessment." Acts 1849, pp. 206, 207.

A section of Broad street between Market street and the Morris Canal was originally paved under the foregoing provision; and had been now repaved by virtue of the following section in the supplement to the charter passed 18th March 1868, p. 411, viz.: "That when more than one-half of the owners of the frontage on the line of any street or section thereof which is now paved, shall apply to have such street or section repaved, it may be lawful for the Com-

mon Council to order and cause the repaving thereof, and they shall assess upon the owners of the lots fronting upon the line of such streets or sections thereof, two-thirds of the costs and expenses of such repaving, and the city treasury shall bear the remaining one-third; and the city shall be entitled to all the old material, and said assessment to be made in all respects as was required by the Act to which this is a supplement and the supplements thereto in cases of the original paving of streets."

Thomas N. McCarter, for plaintiff in error.

Francis, City Counsel, and *Cortlandt Parker*, for defendant in error.—The original paving of the street at the expense of the owners was not a contract which the state could make with them: Cooley Const. Lim. 282; 2 Greenl. Cruise 67; 1 Redfield on Railways (3d ed.) 258. The authorizing, making and imposing of the assessment in question was a lawful exercise of the taxing power, and not of eminent domain: Cooley Const. Lim. 496; *Williams* v. *Mayor of Detroit*, 2 Mich. 560; 31 New York 583; *State, Sigler, pros.*, v. *Fuller*, 5 Vroom 237; *People* v. *City of Brooklyn*, 4 Comst. 430; Sedgwick's Stat. and Const. Law 502; *Hammett* v. *Philadelphia*, 8 Am. Law Reg. 411; *Com.* v. *Woods*, 8 Wright 113; *Magee* v. *Com.*, 10 Id. 359; *State* v. *Newark*, 3 Dutch. 192; *State* v. *Jersey City*, 4 Dutch. 206; *State* v. *New Brunswick*, 1 Vroom 387; Dillon on Municipal Corp. 694; *Gordon* v. *Carnes*, 47 N. Y. 614; *Broadway Baptist Ch.* v. *McAtee*, 8 Bush 512. It rests within the discretion of the legislature to declare the principle and apportionment of all assessments: *Emery* v. *San Francisco Gas Co.*, 28 Cal. 346; *Garrett* v. *St. Louis*, 25 Mo. 508. The legislature may delegate the power of taxation to municipal corporations: Dillon on Mun. Cor. 687 (n. 21 and cases cited); *Gault's App.*, 9 Casey 100; 6 Whart. 44; *State* v. *Dean*, 3 Zab. 335; *Hand* v. *Elizabeth*, 2 Vroom 47; Cooley Con. Lim. 190.

The opinion of the court was delivered by

BEASLEY, Chief Justice.—The writ in this case has brought before the court the proceedings in the assessment of the expenses incurred in repaving the road-bed of a portion of one of the public streets in the city of Newark. The cost of this work has been imposed in accordance with the directions of the legislative act authorizing these improvements, in the proportion of two-thirds of such cost on the owners of the lots fronting on the line of the sec-

tion of the street thus repaved and the remaining third on the city treasury. It thus appears that the statute in question undertakes to fix at the mere will of the legislator the ratio of expense to be put upon the owner of the property along the line of the improvement; and the question is whether such an act is valid.

The inquiry thus involved has of late been so exhaustively discussed in a crowd of judicial decisions, that I do not feel inclined to do more than to so far refer to general principles as may be necessary to explain clearly what I conceive to have been heretofore decided by this court.

The doctrine that it is competent for the legislature to direct the expense of opening, paving or improving a public street, or at least some part of such expense, to be put as a special burthen on the property in the neighborhood o fsuch improvement, cannot, at this day, be drawn in question. There is nothing in the Constitution of this state that requires that all the property in the state, or in any particular subdivision of the state, must be embraced in the operation of every law laying a tax. That the effect of such laws may not extend beyond certain prescribed limits is perfectly indisputable. It is upon this principle that taxes raised in counties, townships and cities are vindicable. But while it is thus clear that the burthen of a particular tax may be placed exclusively upon any political district to whose benefit such tax is to enure, it seems to me it is equally clear that when such burthen is sought to be imposed on particular lands not in themselves constituting a political subdivision of the state, that we at once approach the line which is the boundary between acts of taxation and acts of confiscation. I think it is impossible to assert with the least show of reason that the legislative right to select the subject of taxation is not a limited right. For it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed cannot be contracted to narrower bounds than the political district within which it is to operate, than that such power is entirely illimitable. If such prerogative has no trammel or circumscription then it follows that the entire burthen of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just

compensation, the existence of an unlimited right in the law-making power to concentrate the burthen of a tax upon specified property does not exist. If a statute should direct a certain street in a city to be paved and the expense of such paving to be assessed on the houses standing at the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such. If this cannot be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary. It has its limit, and the only inquiry is where that limit is to be placed.

This question was considered, and as it was supposed was definitely settled, by this court in the case of *Tidewater Company* v. *Costar*, 3 C. E. Green 519. The principle sanctioned by that decision was that the cost of a public improvement might be imposed on particularized property to the extent to which such property was exceptionally benefited: and that any special burthen beyond that measure was illegal. It was upon this principle that the case was rested. The rule thus adopted stands upon the idea that it establishes a standard by which with at least an approach to precision an act of taxation may be distinguished from an act of confiscation.

So far as the particularized property is specially benefited, an exaction to that extent will not be a condemnation of property to the public use, because an equivalent is returned; and this is the ground on which the abnormal burthen put upon the landowner is justified. Speaking on this subject, Chief Justice GREEN says: "The theory upon which such assessments are sustained as a legitimate exercise of the taxing power is, that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which as one of the community he receives in all public improvements, to the precise extent of the assessment:" *State* v. *Newark*, 3 Dutch. 190. It follows that these local assessments are justifiable on the ground alone, that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case, no reason can be assigned why the tax is not general.

An assessment laid on property along a city street for an improvement made in another street in a distant part of the same city, would be universally condemned both on moral and legal grounds. And yet there is no difference between such an extortion and the requisition upon a landowner to pay for a public improvement over

and above the exceptional benefit received by him. It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt, that its exercise can be declared by the courts to be illegal. But such a case, if it can ever arise, is certainly presented when property is specified out of which a public improvement is to be paid for in excess of the value specially imparted to it by such improvement. As to such excess I cannot distinguish an act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burthen; when his land is sequestered for the public use, he contributes more than such quota; and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain.

When then the overplus beyond benefits from these local improvements is laid upon a few landowners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the power to tax. And as it does not seem practicable to define the area upon which a tax can be legitimately laid, and beyond which it cannot be legitimately extended, and as there is, as has been shown, necessarily a limit to the power of selection in such instances, the principle stated in the case cited is perhaps the only one that can be devised whereby to graduate the power. Consequently when the improvement, as in the present instance, is primarily for the public welfare, and is only incidentally for the benefit of the landowner, the rule thus established ought to be rigidly applied and adhered to.

With the doctrine thus expounded, the case of the *State* v. *Fuller*, 5 Vroom 227, is not in conflict. This was an assessment for the improvement of a sidewalk, and in that feature differed from the present one, which is for the improvement of the road bed; I think the difference is a substantial one. A sidewalk has always in the laws and usages of this state been regarded as an appendage to and a part of the premises to which it is attached, and is so essential to the beneficial use of such premises that its improvement may well be regarded as a burthen belonging to the ownership of the land, and the order or requisition for such improvement as a police regulation. On this ground I conceive it to be quite legitimate to direct it to be put in order at the sole ex-

pense of the owner of the property to which it is subservient and indispensable.

But in the reported case there was another circumstance which illegalized the proceedings. A part of the expense of constructing the sidewalk on one side of the street was thrown on the owners of the other side of the same street. The portion of the burthen thus transferred was one-sixth of the expense, and it was directed to that extent to be imposed, irrespective of the amount of any ascertained benefits conferred. This brought the case within the prohibition inherent in the rule laid down in the *Tidewater Case*, so that the proceedings should have been set aside. The suggestion that in this class of case it will be presumed that the benefits equal the burthen imposed until the contrary is shown cannot prevail. If well founded it would have led to a different result in the *Tidewater Case*. The only safe rule is, that the statute authorizing the assessment shall itself fix, either in terms or by fair implication, the legal standard to which such assessment must be made to conform. In no other way can property be adequately protected.

The other objections raised by the counsel of the plaintiff in error do not seem to me well founded. I can perceive no solid foundation for the position that the law under which the assessment in question has been made raises up a contract between the landowner and the public.

This statute declares that it shall be lawful for the common council, on the application of three-fourths of the owners of property in any street, to order, &c., and it then adds, "That after such grading, &c., is effected, then the city shall take charge of and keep the same in repair without further assessment." The argument was that after the landowners had petitioned and the work was done a bargain was constituted, the essential stipulation of which is that the expense of keeping the street in order shall be borne by the public. But how is this language to be converted into that of contract? It is not so in form for it makes no offer to the landowner. Nor is the substance with which it deals the subject-matter of agreement. It does not purport to ask from the citizen anything which the state has not the right to demand. The purpose is to define the mode and the extent of the legislative power of the municipality. The power conceded might have been given in an unqualified form, but its exercise was restricted with

the condition that it should not be used unless a certain proportion of the owners of property consented, and that the power should not be used a second time.

But these limitations on the prerogative of local legislation are concessions to the citizen, and cannot with any show of reason be transformed into considerations moving from the citizen to the state on which a contract can be built up. The admission of such a doctrine would carry many mischiefs with it. Agreements could be inferred from a large number of the ordinary acts of legislation. Public roads are laid upon the application of a certain number of freeholders, and the statute directs that after such roads are laid they shall be opened and maintained at the public expense. Why under such circumstances cannot a contract be claimed as well as in the case now in hand? Numerous other examples of laws from which by the same course of reasoning contracts might be deduced will readily occur if the mind is given to the subject.

Neither do the decisions which were cited lend, as it appears to me, the least countenance to the doctrine in question. These are all cases outside of the ordinary field of legislation, and in which the citizen was induced to do some act, or yield up some right or property which could not be taken from him except by his voluntary cession. The true principle undoubtedly is that when it is alleged that any part of the sovereign power has been parted with by force of an agreement, such agreement must be clearly manifested. The cases are largely collected in the excellent work of Chief Justice COOLEY on Constitutional Limitations 280. The language of the present statute has not such an aspect, and the intendment that it was the intention to give up for ever any part of the public control with respect of the mode of keeping in order the streets of a great city, is not to be entertained for an instant.

This exception to the proceedings cannot be sustained.

On the other points raised on the argument I agree with the views expressed in the Supreme Court. There are other legal difficulties in the mode of making assessments under the statutory provisions above criticised, which were not started on the argument, which I shall not further notice than to intimate that I am not to be understood as sanctioning them by my silence.

On the ground above stated the judgment is reversed.

DALRIMPLE, J., dissented.